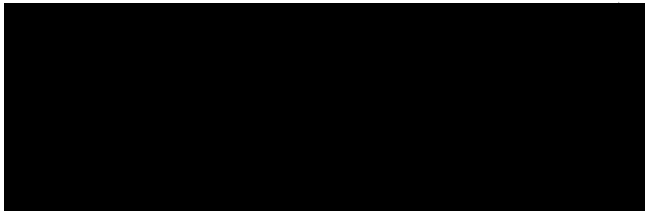




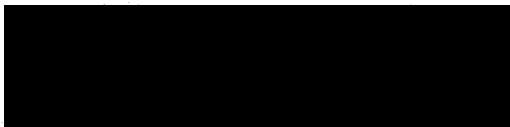
U.S. Citizenship
and Immigration
Services

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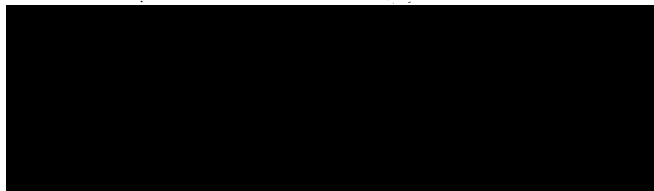
FILE: EAC 02 063 52505 Office: VERMONT SERVICE CENTER Date: OCT 13 2004

IN RE: Petitioner:
Beneficiary:



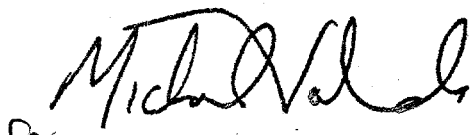
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a martial arts studio. It seeks to employ the beneficiary permanently in the United States as a tae kwon do instructor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 16, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which equals \$26,000 per year.

On the petition, the petitioner stated that it was established on January 7, 1992. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 2000. The beneficiary did not claim any other related employment.

In support of the petition, counsel submitted the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of another, separately incorporated, martial arts studio. As will be discussed below, information pertinent to the finances of that other corporation are not evidence of the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 20, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that

the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested W-2 forms showing the amounts the petitioner paid to the beneficiary during 2000 and 2001.

In response, counsel submitted a letter, dated May 1, 2002, from the petitioner's accountant. That letter states that the petitioner has employed the beneficiary since January of 2001 and paid him \$20,662 during that time. Counsel submitted a printout showing checks paid totaling \$20,662.90 between January 16, 2001 and December 12, 2001, inclusive. That printout does not show to whom those checks were payable. Neither the petitioner, nor counsel, nor the accountant stated why the petitioner did not comply with the request for W-2 forms.

Counsel also provided the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared \$23,270 in ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On July 11, 2002 the Vermont Service Center issued another request for evidence. The Service Center requested evidence pertinent to the beneficiary's education and degree, matters not central to today's decision. With his response, counsel submitted, *inter alia*, a letter dated September 23, 2002, from the petitioner's accountant. The accountant states that the petitioner has consistently produced net income of between \$20,000 and \$30,000 annually, and that the accountant has no knowledge of any pending events that would preclude growth in that income during the coming year.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 7, 2003, denied the petition.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage. Subsequently, in support of that appeal, counsel submitted (1) a letter, dated July 8, 2003, from the petitioner's accountant stating that the petitioner has reported annual taxable income of over \$20,000 and that the petitioner has the ability to pay the proffered wage, (2) a letter, dated May 6, 2003, from the petitioner's owner, stating that he will continue to personally guarantee payment of the proffered wage, (3) copies of two FNMA Form 1004 Uniform Residential Appraisal Reports, dated March 21, 2003 and May 6, 2003, of single family residential properties apparently owned by the petitioner's owner, (4) copies of the petitioner's owner's 2000, 2001, and 2002 U.S. Individual Income Tax Returns, (5) copies of the petitioner's bank account statements for December 2001 and December 2002, (6) what purport to be the petitioner's unaudited "Historical Income Statements," (7) copies of selected pages of bank statements, from January 2001 to July 2002, of an account held by the beneficiary, (8) a copy of a statement of the petitioner's owner's retirement account, (9) a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, (10) a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and (11) two copies of the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of another, separately incorporated, martial arts studio,

The petitioner's 2000 return shows that the petitioner declared ordinary income of \$8,659 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded

its current assets. This office notes, however, that, because the priority date is March 16, 2001, evidence pertinent to the petitioner's finances during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2002 return shows that the petitioner declared ordinary income of \$23,081 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In a letter dated July 8, 2003, counsel urged that the evidence submitted establishes the petitioner's ability to pay the proffered wage. Counsel offered no further argument that any particular document in the file, or any combination of them, supports the proposition that the petitioner is able to pay the proffered wage. Further, what point counsel intended to support by submitting copies of the beneficiary's bank statements is unclear to this office and cannot, therefore, be further addressed.

Counsel's reliance on the petitioner's bank statements is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.¹ As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others, including their full or partial ownership of other corporations, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. Notwithstanding the petitioner's owner's offer to pay the beneficiary's salary personally, the submission of evidence of the petitioner's owner's personal income and assets, including other corporations, is of no effect. The petitioner must show the ability to pay the proffered wage out of its own funds. Evidence of the petitioner's

¹ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

owner's income and assets, including real estate, bank balances, and other corporations, is not evidence of the instant petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

On March 20, 2002, the Service Center requested W-2 forms showing wage payments to the beneficiary. W-2 forms were requested because they are contemporaneously produced evidence of amounts paid and demonstrate that those amounts were paid as wages. Instead, the petitioner submitted a letter, dated May 1, 2002, from its accountant, attesting that the petitioner had paid amounts to the beneficiary.

Evidence which the petitioner creates after CIS points out deficiencies in the initial evidence will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is produced contemporaneously with the event to be proved and that exists at the time of the director's notice, rather than evidence produced for submission to CIS in support of the petition. In the instant case, the accountant's May 1, 2002 letter is insufficiently credible to demonstrate that the petitioner paid wages to the beneficiary. The petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without

reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$26,000 per year. The priority date is March 16, 2001. During 2001, the petitioner declared ordinary income of \$23,270. That amount is insufficient to pay the proffered wage. At the end of that year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no evidence of any other funds available during that year to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner declared ordinary income of \$23,081. That amount is insufficient to pay the proffered wage. At the end of that year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no evidence of any other funds available during that year to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.